Supreme Court, U.S.
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No. 92-1572

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PETER HURWITZ,

Petitioner,

vs.

JOAN LEAR SHER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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In the
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PETER HURWITZ,

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v.

JOAN LEAR SHER,

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REPLY BRIEF FOR THE PETITIONER

In our petition, we demonstrated that the Courts of Appeal are divided over whether to give effect to beneficiary designations that have been filed with ERISA benefit plan administrators. The respondent appears to concede that the Sixth and Eighth Circuits give controlling effect to beneficiary designations on file with plan administrators [Howard v. Branham & Baker Coal Co., 968 F.2d 1214 (table), No. 91-5913, 1992 U.S. App. LEXIS 16247 at 9-10 (6th Cir. 1992) (unfiled beneficiary designation not effective);

McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990) (benefits awarded to last designated beneficiary); Lyman Lumber Co. v. Hill, 877 F.2d 692 (8th Cir. 1989) (same)], while the Seventh and Second Circuits give no effect to such beneficiary designations. [Hurwitz v. Sher, 982 F.2d 778 (2d Cir. 1992) (designation of beneficiary ignored); Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir.) (en banc), cert. denied, 498 U.S. 820 (1990) (same)]. Nor does respondent dispute that the Second and Seventh Circuits maintain differing requirements for a valid waiver of spousal benefits under ERISA. Instead, respondent relies upon limited factual distinctions in asking this Court not to resolve the conflicting legal principles evident in the decisions of the Circuit courts. Because the validity of beneficiary designations under ERISA varies from jurisdiction to jurisdiction, certiorari should be granted to ensure uniformity of federal law in this important area.

I. Respondent Has Failed to Harmonize the Conflicting Decisions of the Courts of Appeal

Respondent's attempt to distinguish the decisions in McMillan and Fox Valley by arguing that these cases concerned divorced spouses "as to whom the explicit ERISA non-waiver rules intended to protect surviving spouses do not apply" (Br. in Opp. at 13) is unpersuasive. Respondent fails to cite any statutory provision or legislative history for her argument that the benefit waiver provisions of ERISA, 29 U.S.C. § 1055(c)(2)(A)(ii), do not apply to divorced spouses. Indeed, such a conclusion would be entirely inconsistent with the legislative purpose of protecting spousal contributions to the creation of retirement benefit plans. See Petition at 16. Moreover, in the McMillan and Lyman Lumber cases it was not the fact of divorce, but the fact that the ex-spouse was the last designated beneficiary, that was the basis for the

Courts of Appeals' decisions. Thus the fact of divorce does not lessen the conflict among the circuits as to whether or not plan administrators should follow beneficiary designations that have been filed with them.[1]

II. Respondent Has Distorted the Meaning of the Unambiguous Statutory Language in Contending that the Antenuptial Agreement Did Not Constitute General Consent to Designation of Non-spouse Beneficiaries

Respondent has transmuted the plain meaning of 29 U.S.C. § 1055(c)(2)(A)(ii) (1988) in a desperate effort to overcome the Second Circuit's error in ignoring the general consent provision of this statute. ERISA provides that a spouse may waive his or her spousal benefits in a writing which "expressly permits designation by the participant without any requirement of further consent by the spouse . . ." 29 U.S.C. § 1055(c)(2)(A)(ii). Under this provision -- which the Second Circuit Court of Appeals disregarded altogether (Pet. at 8a) -- there was no requirement that the spouse's consent designate a beneficiary. Under Treas. Reg. § 1.401(a)-20, Q&A 32(b) and the plan itself, the only party required to designate a beneficiary was the plan participant. His designation as well as the antenuptial consent were on file with the administrator.

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[1] Respondent's attempt to distinguish McMillan on its facts (Br. in Opp. at 14-15) is unsuccessful. The Sixth Circuit's reasoning in both McMillan and Howard clearly bases its decisions on the documents on file with the plan administrator. Nor were the "QDRO" provisions of ERISA (29 U.S.C. § 1056(d)(iii)) the basis for any of the decisions that are in conflict.

In order to argue that the antenuptial agreement did not comply with Section 1055(c)(2)(A)(ii), respondent has sought to re-write the statute. Respondent contends that Section 1055(c)(2)(a)(ii) requires that a spouse "acknowledge that she has the right to limit the consent to a specific beneficiary and nonetheless voluntarily elects to relinquish such a right." (Br. in Opp. at 23). Such a requirement does not appear anywhere in the statute. Neither the statute nor the profit-sharing plan at issue requires such an acknowledgement of rights in a general consent.[2] Indeed, the plain terms of the statute require only that the spouse give general consent to beneficiary designations by the plan participant -- i.e., "consent to designations by the participant without any requirement of further consent by the spouse . . ." 29 U.S.C. § 1055(c)(2)(A)(ii). Respondent, in short, has sought to increase the number of requirements in the statute in order to argue that her antenuptial agreement is incomplete.

By disregarding the general consent provision in the parenthetical clause in Section 1055(c)(2)(A)(ii), the Court of Appeals has effectively invalidated interspousal agreements concerning benefit plan assets that rely on general consent. Respondent virtually concedes that under her view antenuptial agreements cannot be applicable to ERISA benefit plans. (Br. in Opp. at 20). This Court should grant certiorari in order to determine whether, given the plain language of

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[2] Respondent has deliberately interjected into Section 1055(c)(2)(A)(ii) the separate requirement of sub-part (A)(iii) that the spouse acknowledge the effect of a decision to waive spousal benefit rights. See 29 U.S.C. § 1055(c)(2)(A)(iii). If Congress had intended the general consent clause to require an acknowledgement of rights, it would have said so.

ERISA's clause permitting general consent to designation of non-spouse beneficiaries, the Courts of Appeal are correct in sweeping aside state-sanctioned antenuptial agreements that preserve beneficiary designations from prior marriages.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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